

**KIMBERLY STARKS**  
Claimant

**U.S.D. 308**

Respondent

AND

**HARTFORD FIRE INSURANCE CO.**

Insurance Carrier

Docket No. 1,060,513

## STATEMENT OF THE CASE

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Board has considered the record and adopted the stipulations as set forth in its original Order of September 23, 2013, together with the December 12, 2014, Memorandum Opinion of the Kansas Court of Appeals.

The Kansas Court of Appeals concluded the Board erred in finding K.S.A. 44-511(b)(7) cannot apply to this case and reversed the Board's Order. The Court of Appeals further noted the Board did not address whether claimant was engaged in multiple employment at the time of her accident and remanded the issue for further proceedings.

Respondent argues claimant's average weekly wage should be \$226.68, reflecting the amount earned only at respondent. Additionally, respondent argues that because claimant's post-injury earning exceeds her pre-injury average weekly wage, claimant is not entitled to work disability benefits and is limited in her award. In the alternative, should it be found claimant is entitled to work disability benefits, respondent contends claimant

sustained a 100 percent wage loss and 56.5 percent task loss, for a 78.25 percent work disability.

Claimant argues her wages should be aggregated as she performed “the same or a very similar type of work” with both employers as stated in K.S.A. 2009 Supp. 44-511(b)(7). Additionally, claimant contends with the aggregated average weekly wage she was underpaid temporary total disability benefits by respondent. Claimant maintains she sustained a 40 percent wage loss and 75 percent task loss, for a 57.5 percent work disability.

The issues for the Board’s review are:

1. Was claimant performing the same or similar work for each of her employers?
2. What is claimant’s average weekly wage?
3. What is the nature and extent of claimant’s disability?
4. Is there an underpayment of temporary total disability benefits?

#### **FINDINGS OF FACT**

The Board adopts the factual and procedural overview set forth by the Court of Appeals and the Board’s findings of fact as written in the Board’s Order of September 23, 2013. In our Order of September 23, 2013, the Board determined claimant could not aggregate her wages because her injury arose out of and in the course of only her employment with respondent.

The Court of Appeals, in its Memorandum Opinion of December 12, 2014, determined the Board erred and was required to follow *Kinder*.<sup>1</sup> The Court of Appeals wrote:

[W]e are duty bound to follow precedent from our Supreme Court absent some indication the court is departing from its previous position. [Citation omitted.] [Respondent] has presented no persuasive evidence of a departure, and we are aware of none. Accordingly, we reverse the Board’s order rejecting *Kinder*’s precedent and the Board’s mistaken finding that K.S.A. 2010 Supp. 44-511(b)(7) cannot apply to the facts of this case.

Our holding does not fully resolve this matter, however. The Board limited its order to its interpretation of the statute. The Board did not address [respondent’s] other contention that [claimant] was not engaged in “multiple

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<sup>1</sup> *Kinder v. Murray & Sons Constr. Co.*, 264 Kan. 484, 957 P.2d 488 (1998).

employment” because she did not perform “the same or similar work” for each of her employers. [Citation omitted.] The particular issue of whether or not [claimant] was performing “the same or similar work” for each of her employers remains unresolved. Accordingly, we remand that specific issue to the Board for further proceedings.<sup>2</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-511(b)(7) states:

The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

K.S.A. 2009 Supp. 44-510e(a) states, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.... An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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<sup>2</sup> *Starks v. U.S.D.* 308, No. 110,648 (Kansas Court of Appeals unpublished opinion filed Dec. 12, 2014).

### ANALYSIS

#### **1. Was claimant performing the same or similar work for each of her employers?**

The Court of Appeals directed the Board to determine whether claimant performed the same or very similar type of work in her jobs at respondent and Boys and Girls Club (BGC).

The word “similar” has been defined by our Supreme Court to mean “[n]early corresponding; resembling in many respects.”<sup>3</sup> The complete definition of the word “similar” found in Black’s Law Dictionary is:

**Similar.** Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference. *Gangi v. Sears, Roebuck & Co.*, 33 Conn.Sup. 81, 360 A.2d 907, 908. Word “similar” is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases “similar” may mean identical or exactly alike. It is a word with different meanings depending on context in which it is used. *Guarantee Mut. Life Ins. Co. v. Harrison*, Tex.Civ.App., 358 S.W.2d 404, 406.<sup>4</sup>

In the Board’s original Order in this matter, the job duties included in each of claimant’s employments were recorded as follows:

Claimant initially began employment with respondent in 2008 as a substitute teacher assistant, which lasted 2-3 months. Claimant was then employed part-time by respondent as a teacher’s aide from 2008 through August 2011. Claimant worked in the Head Start classroom with children aged 3 years to 5 years. Her main responsibility was assisting the classroom’s teacher, including implementing assigned activities, preparing materials, and preparing the learning environment. A teacher’s aide at times directly educated and gave instruction to students. Duties also included taking attendance, setting up classroom bulletin boards and decorations, supervising children at lunch/snack time and recess, cleaning and sanitizing toys, moving furniture, diapering, toileting, and dressing young children, using a computer, and attending various safety, training, and staff meetings. Claimant also acted as a bus aide while in this position, riding the bus with the children either before or after school. She would, as needed, assist children with their six-point seatbelt, assist with other issues, and impose discipline. This position

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<sup>3</sup> *Marshall v. Kansas Med. Mut. Ins. Co.*, 276 Kan. 97, 103, 73 P.3d 120 (2003); citing Black’s Law Dictionary 1383 (6th ed.1990).

<sup>4</sup> Black’s Law Dictionary, *supra*.

required standing, walking, sitting, reaching, climbing, stooping, kneeling, crouching, and crawling, with occasional lifting and moving.

. . .

Claimant was simultaneously employed part-time with Boys and Girls Club of Hutchinson, Kansas, as both site director for the Lincoln Elementary after school program and as coordinator/director for Keystone Club. Claimant began employment with Boys and Girls Club in 2001. As site director for the Lincoln Elementary after school program, claimant's responsibilities included coordinating and scheduling other employees, supervising employees, planning activities, using a computer, completing paperwork, maintaining a program calendar, and other logistics. Claimant supervised and educated children aged kindergarten through 6<sup>th</sup> grade. The after school program was a classroom setting that included additional physical activities. Claimant would lead group activities, get out and put away materials, serve food and snacks, supervise playground activity, load and unload children in vans and buses, and, at times, move furniture and dress younger children.

Although the majority of claimant's time during the school year at Boys and Girls Club was spent as site director, claimant also performed as coordinator/director of Keystone Club. During the summer, claimant primarily focused on Keystone Club since activities lasted an entire day. The Keystone Club is a community service club for leadership development for older children, aged 7<sup>th</sup> grade through 12<sup>th</sup> grade. Claimant would lead group activities, get out and put away materials, oversee the loading and unloading of buses, set tables and serve food, supervise outdoor activities, and complete paperwork. She would also attend meetings, develop and plan fundraising events, travel to conferences and accompany members on trips, oversee club meetings and election of officers, and work with administration to ensure resources are available to the Keystone Club.<sup>5</sup>

Dr. Barnett listed 14 tasks associated with claimant's job with BGC, 10 of which duplicated tasks performed by claimant with respondent. Based solely on a review of the task lists prepared by Dr. Barnett, the jobs appear similar. Claimant testified that, of the 14 job tasks listed by Dr. Barnett, the only one she did solely for the BGC was Task No. 11, "direct community activities."<sup>6</sup> Claimant stated she performed this task once or twice a month and sometimes on a volunteer basis.

Mr. Benjamin testified claimant performed 16 different tasks while employed by respondent.<sup>7</sup> Of the 16 tasks, Mr. Benjamin testified only 3 were duplicative with tasks

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<sup>5</sup> *Starks v. U.S.D. 308*, No. 1,060,513, 2013 WL 5521842 (Kan. WCAB Sept. 23, 2013).

<sup>6</sup> Claimant's Depo. at 48.

<sup>7</sup> Benjamin Depo. at 15; see also *id.*, Ex. 2 at 6-7.

performed at BGC. Based solely on a review of the task lists prepared by Mr. Benjamin, the jobs do not appear to be similar. A closer look at the task lists shows more similarities than those opined by Mr. Benjamin.

Mr. Benjamin failed to read claimant's testimony regarding her work activities with BGC. Mr. Benjamin assumed claimant worked only with high school aged children in her job with BGC.<sup>8</sup> This is contrary to claimant's testimony that she worked with children as young as kindergarten age.<sup>9</sup>

Task No. 1 in Mr. Benjamin's task list, which relates to claimant's work for respondent (USD), is "[r]ode and supervised children on the bus."<sup>10</sup> This is similar to Task No. 6 on his BGC task list, "[o]perated company van to transport children." Claimant testified she sometimes dressed the children at BGC, especially when the younger kids would mess their pants,<sup>11</sup> which is similar to Task No. 3 on Mr. Benjamin's USD list, "[c]hanged children's diapers and clothing; included assisting with toileting." Task No. 5 on the USD task list, "[c]ompleted program activity schedule and calendar," is similar to Task No. 3 on the BGC task list, "[p]lanned daily lessons and activities."

Task No. 7 on the USD list, "[r]etrieved classroom supplies and materials," is similar to Task No. 11 on the BGC list, "[s]hopped for supplies and materials." With regard to Task No. 8, "[s]et up classroom bulletin boards and decorations," and Task No. 9, "[t]aught and participated in activities with children; included field trips," on the USD list, claimant testified she taught and participated in activities, and set up and tore down activities with the children at BGC.<sup>12</sup> Claimant also operated a computer at BGC, which is Task No. 11 on the USD list.

Task No. 13 on Mr. Benjamin's USD list, "[r]esearched and put together supply lists; included completing inventory," is similar to Task No. 10, "[o]rdered supplies and materials" and Task No. 11, "[s]hopped for supplies and materials," on the BGC list. Task No. 14, "[s]upervised children at recess," is similar to Task No. 5 on the BGC list, "[p]articipated in activities and lessons with children." Claimant also testified she would supervise students from the time school ended until 6:00 p.m.<sup>13</sup> Task No. 16, "[s]et up classroom; included for

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<sup>8</sup> *Id.* at 21.

<sup>9</sup> See Claimant's Depo. at 28.

<sup>10</sup> See Benjamin Depo., Ex. 2. All references to task numbers are based upon Mr. Benjamin's USD and BGC task lists unless otherwise noted.

<sup>11</sup> See Claimant's Depo. at 48.

<sup>12</sup> See *id.* at 37.

<sup>13</sup> See R.H. Trans. at 16-17.

special events,” is similar to several BGC tasks, including assisting in planning activities, participating in activities and participating in service projects. Claimant testified:

I would . . . go to Boys and Girls Club which would be Lincoln at that time and get everything set up for that program which started when school was out at 3:00 . . .

<sup>14</sup>

At BGC, based upon a comparison of the task lists prepared by Mr. Benjamin and review of claimant’s testimony, claimant performed at least 10 out of 16 of the tasks she performed with respondent. Both jobs involved caring for and educating children. The Board finds claimant performed very similar types of work with respondent and BGC.

## **2. What is claimant’s average weekly wage?**

Claimant earned \$1,500.00 per month with BGC during the 26 week period prior to her injury by accident.<sup>15</sup> Pursuant to K.S.A. 2009 Supp. 44-511(b)(2), claimant’s average weekly wage while working for BGC is \$346.15 per week. Claimant earned \$226.68 per week from her employment with respondent. The combined average weekly wage is \$572.83, with a resulting compensation rate of \$381.91.

## **3. What is the nature and extent of claimant’s disability?**

Dr. Barrett reviewed the task list prepared by Dr. Barnett. Of the 26 unduplicated tasks on the list, Dr. Barrett opined claimant was unable to perform 20 for a 76.9 percent task loss. Upon review of Mr. Benjamin’s task list, Dr. Barrett opined claimant experienced a 56.5 percent task loss. Dr. Stein also reviewed the task list prepared by Dr. Barnett. Of the 26 unduplicated tasks on the list, Dr. Stein opined claimant was unable to perform 19 for a 73 percent task loss. Dr. Stein also reviewed the task list prepared by Mr. Benjamin. Of the 46 unduplicated tasks on the list, Dr. Stein opined claimant was unable to perform 21 for a 45.7 percent task loss.

The Board finds both physicians to be equally credible and averages their assessment of task loss for a combined loss of 63 percent, based on the task lists prepared by Mr. Benjamin and Dr. Barnett. Claimant’s average weekly wage dropped from \$572.83 working for respondent and BGC to \$346.15 working solely for BGC. This results in a wage loss of 39.6 percent. The combined wage loss of 39.6 percent and task loss of 63 percent result in a work disability of 51.3 percent.

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<sup>14</sup> Claimant’s Depo. at 41.

<sup>15</sup> See R.H. Trans., Cl. Ex. 1.

**4. Is there an underpayment of temporary total disability benefits?**

Respondent paid 5.29 weeks of temporary total disability (TTD) at the rate of \$151.13, for a total of \$798.88. Claimant does not dispute the time period during which TTD is owed. Claimant's compensation rate is \$381.91 per week. Respondent underpaid TTD by \$230.78 per week for 5.29 weeks, resulting in a total underpayment of \$1,220.83.

**CONCLUSION**

The Board finds claimant performed very similar types of work with respondent and the BGC. Claimant's combined average weekly wage is \$572.83. Claimant suffers a work disability of 51.3 percent. Respondent underpaid TTD by \$230.78 per week for 5.29 weeks, resulting in a total underpayment of \$1,220.83.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 15, 2013, is modified.

The claimant is entitled to 5.29 weeks of temporary total disability compensation at the rate of \$381.91 per week or \$2,020.30, followed by 212.90 weeks of permanent partial disability compensation at the rate of \$381.91 per week or \$81,308.64, for a 51.3 percent work disability, making a total award of \$83,328.94.

As of August 24, 2015, there would be due and owing to the claimant 5.29 weeks of temporary total disability compensation at the rate of \$381.91 per week in the sum of \$2,020.30, plus 212.90 weeks of permanent partial disability compensation at the rate of \$381.91 per week in the sum of \$81,308.64, for a total due and owing of \$83,328.94, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**



Dated this \_\_\_\_\_ day of August, 2015.

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BOARD MEMBER

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